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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MAR 25 1974

H. STUART CUNNINGHAM
At _____ Clerk

ALLIED LEISURE INDUSTRIES, INC.,

Plaintiff,

v.

MIDWAY MANUFACTURING CO.,

Defendant.

No. 73 C 2682

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the HON.
WILLIAM J. BAUER, one of the Judges of said Court,
in his courtroom in the United States Courthouse,
Chicago, Illinois, on Friday, October 19, 1973, at
the hour of 10:00 o'clock, a.m.

APPEARANCES:

MESSRS. LETTVIN & GERSTMAN
135 South LaSalle Street
Room 808
Chicago, Illinois 60603,
BY: MR. GEORGE H. GERSTMAN,

appeared on behalf of the Plaintiff;

MESSRS. FITCH, EVEN, TABIN & LUEDEKA
135 South LaSalle Street
Room 2157
Chicago, Illinois 60603,
BY: MR. DONALD L. WELSH,

appeared on behalf of the Defendant.

ROSCOE C. GILES, JR.
Official Court Reporter
Telephone 922-3820

THE CLERK: 73 C 2682, Allied Leisure Industries v. Midway Manufacturing, motion to temporarily restrain the defendant from selling plaintiff's circuit board, et cetera.

MR. GERSTMAN: Good morning, your Honor. I am George Gerstman, representing the plaintiff.

MR. WELSH: Donald Welsh, your Honor, representing the defendant, with Mr. Tomlinson, who is general counsel for defendant and its parent company.

MR. GERSTMAN: I brought this motion, your Honor, to maintain the status quo of about a week ago before the defendant began flagrantly pirating the plaintiff's printed circuit hardware, which is copyrighted. This action relates to a specific printed circuit. This is an example of the plaintiff's printed circuit, which takes months to prepare and thousands of dollars to complete and has copyright notices on both sides. An application was filed with the Copyright Office. The hardware was registered.

THE COURT: Let us find out whether he contemplates doing such matter before next Tuesday morning.

MR. WELSH: Your Honor, the defendant is in production at this moment making machines using the accused printed circuit board. There are 300 employees of the defendant company involved.

THE COURT: Do you intend to sell, distribute, advertise or move them out of your possession between now and Tuesday?

MR. WELSH: Yes, your Honor. They are in heavy production. At the rate they are being shipped, I believe the amount being shipped per day amounts to \$60,000.

We were just this morning, a few minutes ago, furnished with this motion and the affidavits. I believe that they are -- to the extent I have had a chance to read them since the call began -- they are wholly deficient in the failure to show any irreparable damage. They fail to show that there is any damage, other than monetary, which might result.

THE COURT: I will give you another twenty minutes to look at it and then you can address yourself to it.

I would like to look at it myself. Hold it

for twenty minutes.

MR. WELSH: Thank you, your Honor.

(Whereupon, the Court gave its attention to other matters, after which the following further proceedings herein were had; to-wit):

THE COURT: All right, gentlemen, now, first, the plaintiff, then the defendant.

MR. GERSTMAN: One thing that I have not yet brought to your attention, your Honor, is here is the plaintiff's basic board that is copyrighted, copyright notices on both sides. The plaintiff purposely put in about eight false lines, just to trap a copier. Not only are all of the other lines in defendant's the same way; every line is the same, except the defendant's, instead of being quite as rounded, they angled them slightly. But everything is in the same place, every hole is in the same place, the lines are in the same place and even those eight false lines are present in defendant's, and this is registered in the Copyright Office.

In manufacturing these, the process that has to be gone through is extremely complicated. It

takes several months, thousands of dollars and needs protection. One of the problems in the industry is that there has been a lot of copying; and, generally, the items are not copyrighted. In fact, there is a two -- this is used in a four-player ping-pong or tennis game played on a television screen.

I do not know if you have ever seen those types of games.

THE COURT: I have been spared that, but go ahead.

MR. GERSTMAN: They are a lot of fun, actually.

There is a two-player game on the market. There are hockey games and different types of games. Most of those are copyrighted and, in fact, the defendants are producing other types of games.

We have no complaint about the other types of games. It is this specific one, which is our only complaint, because this board is copyrighted. The way the defendants obtained it -- instead of doing all the months of research and circuit analysis, testing and diagramming and art work, the defendants merely took the art work from the plaintiff's unit,

traced right over it, copied the lines, used the exact same elements.

This is the front side (indicating). They are completely interchangeable with each other. Every element is the same, except for one particular capacitor, which is not meaningful as far as the difference. But everything else is the same. They merely copied everything.

One of the real problems here is that the defendants now, with the units, are able to get right on the market immediately. They do not have to go through the months of research; and they are price cutting. In fact, they are ruining the market for the plaintiff and plaintiff has built up a sales territory, good customers throughout the world. Now there have been customers who have actually told the plaintiff that they will have to cut their prices to meet defendants' prices. His whole system of marketing is being ruined. This is the type of thing where, when you get the customer for a four-player unit, that that is the same customer as one who might also buy a two-player unit, a hockey game, a baseball game, whatever other

games you have. So when they lose customers, the customers could be lost forever. It is very easy to lose customers, when the defendant can charge a couple of hundred dollars less, because they did not have any research expenditure.

There is a similarity between this and tape piracy, which is now clearly against the law; but the only difference between this and tape piracy is that this type of copyright infringement has always been covered by the copyright statutes, whereas the tape was a little unclear. But the Copyright Office recognized that this is registerable subject matter and issued the registration.

Prior to the defendants coming on the market, the vice president of defendant had lunch and talked with the president of plaintiff. The plaintiff's president told him that we had a copyright on the board. The defendant's vice president advised him, "Well, we are also coming out with a four-player unit," but the defendant's vice president said that he would not copy the art work. He would not use the same art work.

So he said, "As long as you do not use the same

art work, fine."

We would have no complaint if they came out with their own unit, but, instead, they copied everything and they did not have to worry about any of these past expenditures. So now the plaintiff is going to lose its customers because of this; and we think that it is a flagrant abuse of the copyright laws. In fact, it is a misdemeanor under the copyright laws and we feel we are entitled to an injunction, at least to maintain the status quo until we can have a hearing. This is far from the defendant's only business. The defendant manufactures amusement devices. It is a fully owned subsidiary of Bally Manufacturing. They have other items. This is the only item that is before this Court. We want to stop them from selling and advertising these until we can have a hearing.

MR. WELSH: Your Honor, if the Court please, I have two main points: First of all, having now had the opportunity to read this complaint and other papers and discuss it with our principal who happens to be here and had a chance to read it too,

we dispute many of the allegations in the complaint and the statements in the affidavits which accompany the motion for a restraining order.

The other main point -- and I will go back to the first -- but the other main point is the plaintiff has yet, either in these papers or even in argument, to indicate where there is any irreparable -- immediate and irreparable damage of the nature required to justify a temporary restraining order.

Counsel just alluded to the fact that Midway, the named defendant, is a wholly-owned subsidiary of Bally Corporation. This is true. Bally is a publicly held company, expecting to do a gross business of approximately one hundred twenty million dollars this year; so there should not be any question about the financial responsibility of the company or its capability to respond with any damages, if, in fact, the charge of copyright infringement is found to be true.

Returning to the disputed statements, first of all, the Court should be advised that the four-player game now under consideration is an outgrow of the

original two-player game, which was a development of a competitor company, Hatari, on the West Coast at considerable expense to the defendant here, who expended, I am told, on the order of \$50,000 for research, leading to this printed circuit board for use in a two-man game. The board in question today is simply a modification of this. So contrary to the statement of the man from Universal, who said that he designed this, he said, "It took approximately 1500 manhour to produce a printed circuit drawing, all of which was original effort on my part."

That is one of the main points of dispute.

I am also informed that the accused and the copyrighted boards are not identical. They are not interchangeable, which is also contrary to the statements here.

I am further informed that rather than the defendant charging a lower price than the plaintiff, the reverse is true. So there is not even damage of the lowering of prices.

These papers and the argument are void of any real damage, even to support a preliminary injunction,

let alone a temporary restraining order.

I think, at the very least, we should be given an opportunity to prepare for a preliminary injunction hearing if the Court feels it necessary; but under the rules, it is our position that the plaintiff has failed to make even a prima facie case to justify a temporary restraining order.

I might say further there are approximately ten manufacturers at the present time of this four-player ping-pong game; and the defendant is only one of those. I am further informed that he is smaller in this particular portion of the business than the plaintiff.

This is the sole business of the named defendant Midway at this time and the damage to defendant, which would involve the laying off of approximately 300 people who are employed solely in the manufacture of the machines in which this circuitry is used, plus the potential loss of profit in these machines, which is substantial -- on the order of \$10,000 a day, I am informed -- the potential damage to the defendant which would result from issuing a temporary restraining order

far outweighs any damage that the plaintiff has asserted, which again even for a preliminary injunction -- which is not such an extraordinary remedy as the temporary restraining order. I think the plaintiff should even fail there; but, in any event, the defendant should have the opportunity.

I am further informed that the accused board was not a copy; that approximately two weeks of engineering was required to make original drawings. There was no photographing, as counsel has asserted. All of the steps in arriving at that board of defendant were taken as original effort of the defendant. So we dispute the question of copying.

The functions -- some are similar, but there are other functions which the defendant has built in this board that are not present in the plaintiff's board. There are no non-functional lines. I think counsel referred to them as "false lines". Maybe lines are in similar places in defendant's board. I have had no chance to compare these to know where they are; but I am informed that every line in the defendant's board is functional and the boards are not interchangeable, as I have said.

So there are many facts in dispute here. I think the most important thing is the failure to indicate that there is any real damage, other than monetary damages, which the defendant certainly is responsible financially and would be able to pay if they were ever awarded.

THE COURT: I assume it would not take you long to prepare affidavits supporting these statements you have just made.

MR. WELSH: I think that could be done -- well, possibly, here today. I do not know where the people are located.

THE COURT: I will give you until 4:00 o'clock to respond in writing and I will rule on the motion for a temporary restraining order at 4:00 o'clock this afternoon. You have got until then. That gives you five hours.

MR. WELSH: Thank you, your Honor.

I am informed that some of the principals are located in California.

THE COURT: I will accept an affidavit that you have conferred with them and that is what they have told you.

MR. WELSH: Thank you, your Honor.

MR. GERSTMAN: Your Honor, may I state one thing.

I do not want anyone found guilty of perjury. Before any affidavit is produced -- Mr. Welsh probably has not had a chance to compare, so he does not realize this; but the circuits are identical, except for a couple of minor lines.

THE COURT: That is what you have said. Do not repeat yourself.

MR. GERSTMAN: Well, I do not want him to put forth an affidavit -- it is such a lie that it would be a shame to have anything like that on the record.

THE COURT: I would suggest that you let him worry about his posture and you worry about your own.

Four o'clock this afternoon, gentlemen.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ALLIED LEISURE INDUSTRIES, INC.,)	
)	
Plaintiff,)	
)	
v.)	No. 73 C 2682
)	
MIDWAY MANUFACTURING CO.,)	
)	
Defendant.)	

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the HON.
WILLIAM J. BAUER, one of the Judges of said Court,
in his courtroom in the United States Courthouse,
at 4:00 o'clock of the same afternoon.

APPEARANCES:

(As heretofore noted.)

THE CLERK: 73 C 2682, Allied Leisure Industries, v. Midway Manufacturing.

MR. WELSH: Good afternoon, your Honor.

We have been endeavoring to follow the suggestion of the Court. We have here now three affidavits in support of the statements, which I informed the Court about this morning; and one is on its way, a fourth one.

I am sorry we did not have time to put blue-backs on.

THE COURT: That is all right.

MR. WELSH: I might say, your Honor, that all of the affiants are present in Court in case the Court should have any questions.

THE COURT: On a motion for a temporary restraining order, I do not require nor anticipate any evidentiary matters to be presented.

Do you want to say anything?

MR. GERSTMAN: Yes. The first thing, I noticed the affidavit of George T. Balhuda, he admits copying at Paragraph 10, Page 4. He said that he copied or examined our client's four-player printed circuit and during this effort, he noted

that some of the holes and lines in our client's board appeared to have no function. So he instructed the designer of the artwork for his board not to include in his board corresponding holes and lines.

I am glad to see he admits that he copied; but he tried to avoid some of the things. Unfortunately, he did not avoid putting in some lines and holes that have no function.

In fact, these holes and lines were put there specifically to trap copyright infringers and I would be glad to point out to the Court which lines and holes I am talking about.

THE COURT: No, do not bother.

There are two things necessary for a temporary restraining order: One is the probability of success in the ultimate trial; and the other is irreparable injury, unless the temporary restraining order is immediately delivered.

I have no intention of passing on the probability of success; but I think because of the nature of the case, that what you are really talking about is monetary damages. I do not consider it, nor do I think this Circuit has ever considered monetary

damages -- where you have a defendant who is able to meet its financial burdens; and apparently this one not only can but will -- to be irreparable damage. I will, therefore, deny the motion for a temporary restraining order and set the matter before Judge Decker on Tuesday morning at 10:00 o'clock, for what disposition he might choose relative to the petition for a preliminary injunction.

MR. WELSH: Thank you, your Honor.

THE COURT: Surely.


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Plaintiff,)	
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v.)	No. 73 C 2682
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MIDWAY MANUFACTURING CO.,)	
)	
Defendant.)	

C E R T I F I C A T E

I, Roscoe C. Giles, Jr., do hereby certify
that the foregoing is a true, accurate and complete
transcript of the proceedings had in the above-
entitled cause before the HON. WILLIAM J. BAUER,
one of the Judges of said Court, in his courtroom
at Chicago, Illinois, on October 19, 1973.



Official Reporter
United States District Court
Northern District of Illinois